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**“THE BENEFITS OF THE DEMOCRACY CANON  
AND THE VIRTUES OF SIMPLICITY:  
A REPLY TO PROFESSOR ELMENDORF”**

Professor Richard L. Hasen

THE BENEFITS OF THE DEMOCRACY CANON  
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A REPLY TO PROFESSOR ELMENDORF  
RICHARD L. HASEN\*

INTRODUCTION

In a recent Article,<sup>1</sup> I describe and defend a longstanding substantive canon of statutory interpretation, which I dub “the Democracy Canon.”<sup>2</sup> The Canon calls upon courts to liberally construe election statutes under certain circumstances so as to favor enfranchisement of the voter and to maximize voter choice. For example, a court applying the Canon could order election officials to count a vote cast by a voter who used a check mark rather than a statutorily-mandated “x” to indicate the voter’s choice.<sup>3</sup> The Canon instructs that a voter’s minor technical deviations from statutory requirements (or an election official’s failure to follow statutory procedures) ordinarily should not lead to voter disenfranchisement.

Though the name “Democracy Canon” is new, the Canon itself has a long and distinguished pedigree. Indeed, I traced its origin back to at least 1885, when the Supreme Court of Texas recognized that “[a]ll statutes tending to limit the citizen in the exercise of [the right of suffrage] should be liberally construed in his favor.”<sup>4</sup> Since then, it has been applied in myriad state courts, by judges of all political and ideological stripes, to deal with a wide variety of election administration issues.<sup>5</sup> Many state legislatures have seen fit to codify the Canon, providing for liberal construction of various election administration statutes.<sup>6</sup> For reasons explained in my Article and revisited below, I believe the Canon is a sound one and that its use should be extended to federal courts.<sup>7</sup> At the very least,

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<sup>1</sup> Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

<sup>2</sup> A substantive canon is a rule of statutory interpretation based in policy. Such canons “reflect judicially-based policy concerns, grounded in the courts’ understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.” James J. Brudney & Corey Dislear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13 (2005).

<sup>3</sup> Hasen, *supra* note 1, at 84-85 (describing *Fallon v. Dwyer*, 90 N.E. 942 (N.Y. 1910)).

<sup>4</sup> *Owens v. State ex rel. Jennett*, 64 Tex. 500, 1885 WL 7221, at \*7 (1885).

<sup>5</sup> Hasen, *supra* note 1, at 83-86.

<sup>6</sup> *Id.* at 79 n.49.

<sup>7</sup> *Id.* Pts. II, III.

federal courts should not find constitutional problems when a state court, which has relied upon the Canon consistently in the past, applies it to resolve a pending election dispute.<sup>8</sup>

In this issue of the *Cornell Law Review*, Professor Christopher S. Elmendorf provides a thoughtful and detailed Response to my Article.<sup>9</sup> Sandwiched between praise for my Article at the beginning and end of his Response,<sup>10</sup> however, is a sustained attack on my argument for the Democracy Canon. Professor Elmendorf worries that the Canon “could provide a varnish of legality for far-fetched interpretations of the federal election statutes.”<sup>11</sup> He states that my arguments in defense of the Canon “are so tenuous that one wonders whether” they are the true reasons I defend the Canon. He argues the Canon cannot be defended on “good results” grounds because election law cases always involve tradeoffs among competing values.<sup>12</sup> He says that the Canon will exacerbate tension in the judiciary, leading to more partisan judicial decisionmaking.<sup>13</sup> He also suggests that application of the Canon on the federal level is likely to lead to less bipartisan election legislation in Congress.<sup>14</sup> The best he can say about the Canon is that (continued) court application of it would not be “disastrous.”<sup>15</sup>

Professor Elmendorf then spends more than half of his Response offering three alternative canons of interpretation in statutory election law cases which he claims are “more normatively defensible and less politically treacherous” than the Democracy Canon.<sup>16</sup> Professor Elmendorf concedes that his leading alternative proposed canon, the Effective Accountability Canon (the EA Canon), has not been adopted by any court and has been rejected repeatedly by the Supreme Court in its constitutional variant.<sup>17</sup> Grounding the EA Canon in a number of constitutional provisions, most importantly the Guarantee Clause, Professor Elmendorf advocates use of the EA Canon to interpret statutes to (1) insure that the voting public is representative of the group of people entitled to vote; (2) improve the aggregate competence of the voting public to make decisions about which candidates retrospectively and prospectively act in the voters’ interest; and

<sup>8</sup> *Id.*, Pt. IV. In his Response to my Article, Professor Elmendorf does not comment upon this aspect of my Article, which I consider to be among its most important points.

<sup>9</sup> Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. (forthcoming 2010). Professor Elmendorf’s Response is almost as long as my original Article.

<sup>10</sup> *Id.* at \_\_\_\_ [3] (calling Article “important”); *id.* at \_\_\_\_ [49] (calling Article “terrific”).

<sup>11</sup> *Id.* at \_\_\_\_ [4].

<sup>12</sup> *Id.* at \_\_\_\_ [5].

<sup>13</sup> *Id.* at \_\_\_\_ [6].

<sup>14</sup> *Id.* at \_\_\_\_ [13-14].

<sup>15</sup> *Id.* at \_\_\_\_ [16].

<sup>16</sup> *Id.* at \_\_\_\_ [4].

<sup>17</sup> *Id.* at \_\_\_\_ [34-35].

(3) facilitate coordination among like-minded voters. If accepted by courts, the EA Canon could be used interpret ambiguous statutes to attack everything from the timing of elections to the drawing of electoral districts, to the existence of nonpartisan elections, and much more.<sup>18</sup>

There is an ethereal feel to Professor Elmendorf's Response. He would throw out an accepted tool of statutory interpretation that has been used since 1885 in many states by judges of varied political persuasions in favor of a convoluted, complex alternative that has never been accepted by any court, that would be more disruptive of the political system than the Democracy Canon has been, and that would be more prone to partisan manipulation than the Democracy Canon. In short, Professor Elmendorf would replace tradition and simplicity with ivory tower complexity, and replace a canon with a proven track record with one that courts would struggle to understand, much less apply.

This brief Reply makes three principal points. First, the Democracy Canon is eminently defensible on normative grounds as protecting voters' rights. It does not suffer from the defects Professor Elmendorf describes. Importantly it has not exacerbated partisan tensions among the judiciary; to the contrary, the Canon can serve to diffuse partisan tension. Professor Elmendorf confuses the "access versus integrity" debate, which breaks down along Democrat-Republican lines, with application of the Democracy Canon, which does not.

Second, extension of the Democracy Canon to federal courts is unlikely to change the nature of Congressional dealmaking in the election administration arena. Congressional Republicans are unlikely to avoid passing election law legislation that might be subject to the Canon because the Canon could be just as advantageous to presumed Republican interests as to Democratic interests; imagine, for example, judicial application of the Canon to a statute governing the counting of military overseas ballots. Likely the possibility of the Canon's deployment by the federal judiciary would have no effect on Congressional dealmaking.

Third, courts are more likely to accept proposals for rules governing the judicial role in resolving election law disputes if the proposals are simple and grounded in historical practice and political reality. For this reason, the Democracy Canon shows far more promise than the EA Canon in structuring judicial review of election law statutes. Far from being near-"disastrous," the Democracy Canon's extension to federal courts should be a welcome development.

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<sup>18</sup> *Id.* at \_\_\_\_ [36-38] (footnotes omitted).

## I. DEFENDING THE DEMOCRACY CANON

Part II of my Article provides a detailed defense of the Democracy Canon as a tool of statutory interpretation, and Part III deals with the most significant objection to its application: a worry about the role the Canon could play in further politicizing the judiciary, which has already shown itself politicized over certain election law disputes. I do not repeat that extensive defense in this Reply. Instead, in this Part I respond to Professor Elmendorf's three main criticisms of the use of the Democracy Canon. First, he claims that the Democracy Canon cannot be justified as a means of enforcing an underenforced constitutional norm, on "good results" grounds, or on preference-elicitation grounds. Second, he claims that extension of the Democracy Canon will increase partisanship in the judiciary. Third, he claims that the use of the Canon in federal courts will lead to "far-fetched" interpretations of federal election statutes. I save until the next part of this Reply a response to Professor Elmendorf's other claim, that the federal court use of the Democracy Canon is likely to deter future bipartisan election administration legislation.

*Justifications for Use of the Canon.* As I explained in *The Democracy Canon*,<sup>19</sup> the rationale for the Democracy Canon as a tool for interpreting election statutes is straightforward. The Canon's stated purposes usually are described in terms of its role in fostering democracy. Its purpose is "to give effect to the will of the majority and to prevent the disfranchisement of legal voters."<sup>20</sup> It plays a role in "favoring free and competitive elections."<sup>21</sup> It recognizes that the right to vote "is a part of the very warp and woof of the American ideal and is a right protected by both the constitutions of the United States and of the state."<sup>22</sup> Liberal construction of election laws serves "to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidate on the ballot, and most importantly to allow voters a choice on Election Day."<sup>23</sup>

These lofty ideals as expressed by numerous state courts across generations resonate in the U.S. Constitution's protection of the ideal of voter equality. Although that ideal has been expressed by the United States Supreme Court in many cases, such as those recognizing the unconstitutionality of poll

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<sup>19</sup> Hasen, *supra* note 1, at 77.

<sup>20</sup> *Montgomery v. Henry*, 39 So. 507, 508 (1905).

<sup>21</sup> *State ex rel. White v. Franklin Cty. Bd. Of Elections*, 598 N.E.2d 1152, 1154 (Ohio 1992).

<sup>22</sup> *State ex rel. Beck v. Hummel*, 80 N.E.2d 899 (Ohio. 1948).

<sup>23</sup> *Catania v. Haberle*, 588 A.2d 374, 379 (N.J. 1991).

taxes<sup>24</sup> and the requirement of districts of equal population,<sup>25</sup> it is a norm that has been underenforced by the courts, most recently in *Bush v. Gore*<sup>26</sup> and *Crawford v. Marion County Elections Board*.<sup>27</sup> Simply put, the courts have not enforced any constitutional right to vote as broad as the rhetoric about constitutional values in the Supreme Court's cases. The Democracy Canon therefore can enforce these underenforced constitutional norms through statutory interpretation.<sup>28</sup> Even if the Supreme Court has not always strongly accepted the norms behind the canon, they have both popular support as well as support in state courts and state legislatures. The Supreme Court has no monopoly on determining which constitutional values it chooses not to fully enforce may be enforced more strongly by other judicial, legislative, and executive actors.

Professor Elmendorf's attack on this underenforcement argument is curious. He calls this rationale "tenuous"<sup>29</sup> and "wonders whether the true reason that Hasen favors the Democracy Canon is because he personally subscribes to the values the Canon embodies."<sup>30</sup> Professor Elmendorf has drawn a false dichotomy: the reason I put forward the underenforcement argument is *because* I believe the constitutional values which are underenforced deserve greater enforcement. This is no different from a scholar who favors the rule of lenity as a tool of statutory interpretation out of a belief that prosecutors have too much discretion in choosing criminals to prosecute,<sup>31</sup> or who favors use of the avoidance canon because it allows the Supreme Court to advance a more liberal understanding of constitutional rights at a time when conventional politics has become suspicious of expanded rights for disfavored groups and individuals.<sup>32</sup> In short, the underenforcement and "good results" arguments overlap.

Professor Elmendorf further argues that the Democracy Canon is unnecessary because there is no underenforcement of the constitutional right to vote. He claims that the Supreme Court has taken a "big step" toward full enforcement of constitutional voting rights in its recent *Crawford* case.<sup>33</sup> This argument is unconvincing. As Professor Elmendorf himself has noted

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<sup>24</sup> *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

<sup>25</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>26</sup> 531 U.S. 98 (2000).

<sup>27</sup> 128 S.Ct. 1610 (2008).

<sup>28</sup> Hasen, *supra* note 1, at 98-100.

<sup>29</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [5].

<sup>30</sup> *Id.*

<sup>31</sup> Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1 J. LEGIS & PUB. POL'Y 105, 129 (1997).

<sup>32</sup> Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005).

<sup>33</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [18].

elsewhere,<sup>34</sup> *Crawford* contains no majority opinion and it provides no solid guidance for lower courts to adjudicate constitutional challenges to garden-variety election laws. Indeed, Professor Elmendorf identifies five separate ways that a lower court might interpret the rule of *Crawford*, including some variations under which plaintiffs have virtually no chance of succeeding in vindicating their constitutional claims.<sup>35</sup> While there is some uncertainty as to the future use of *Crawford* by lower courts and the Supreme Court, the opinion (which does not even reference *Bush v. Gore*'s aspirational statement about the unconstitutionality of valuing one person's vote over that of another<sup>36</sup>) hardly eliminates two centuries of court constitutional underenforcement of voting rights. To the contrary, *Crawford* is a brand new decision from a conservative Supreme Court which generally does not seem intent on expanding voting rights;<sup>37</sup> Professor Elmendorf points to no evidence showing lower courts relying upon the case to expand the constitutional rights of voters.<sup>38</sup>

Professor Elmendorf also claims that defending the Democracy Canon on "good results" grounds is problematic, because there will always be tradeoffs among competing values in election law cases, and there is no reason to favor the enfranchisement of voters over other values, such as reducing the fiscal costs of election administration.<sup>39</sup> To begin with, often there will *not* need to be a tradeoff among competing values. Consider again a court's decision under the Democracy Canon to allow a "check mark" rather than a statutorily-commanded "x" to count as a valid vote. It is hard to imagine important competing values on the other side of such a decision, at least so long as the courts have been applying a long-standing rule to use the Canon in appropriate cases.<sup>40</sup> In additions, courts or legislatures often have shown themselves willing make the tradeoff among

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<sup>34</sup> Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507 (2008).

<sup>35</sup> *Id.* at 536-37.

<sup>36</sup> *Bush v. Gore*, 531 U.S. at 104-05 ("Having one granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.").

<sup>37</sup> Hasen, *supra* note 1, at 99-100.

<sup>38</sup> On the practical difficulties of courts doing so, see Julien Kern, "As-Applied" Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws after *Crawford*, 42 LOY. L.A. L. REV. 629 (2009).

<sup>39</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [22]. He lists eight "likely" "shared values" which might need to be traded off against the Democracy Canon.

<sup>40</sup> As I explain in Part IV of *The Democracy Canon*, serious due process concerns may arise when a court uses the Democracy Canon for the first time in a disputed election, thereby changing the rules of the game as they existed on election day. For more on this "lawlessness" principle, see Richard L. Hasen, *Bush v. Gore and the Lawlessness Principle: A Comment on Professor Amar*, 61 FLA. L. REV. 979 (2009).

competing values by adopting the Democracy Canon as a default rule. When a legislature enacts the Democracy Canon through a statutory rule of interpretation,<sup>41</sup> it represents a democratically-enacted decision to favor the interests of voters' enfranchisement over other competing interests in election administration. When courts adopt the Canon as a common law principle, they adopt a default rule likely favored by voters behind a veil of ignorance, a rule which nonetheless is subject to legislative override by the democratically-elected legislature. The Democracy Canon does not privilege the interest of voter enfranchisement over all interests in every case; but it does provide a starting point for discussion, with appropriate weight given to a major value in democratic society, voter enfranchisement.<sup>42</sup>

Professor Elmendorf also takes issue with my other argument for the Democracy Canon, that it will be "preference-eliciting."<sup>43</sup> Under the preference elicitation argument, if a legislature wishes to pass an election law that would not be subject to the Democracy Canon, and would be read strictly so as not to maximize voter enfranchisement, it can pass a law to overcome a default judicial application of the Democracy Canon.<sup>44</sup> In other words, judicial adoption of the Democracy Canon will spur the Legislature to override it in appropriate cases.

Professor Elmendorf is skeptical that courts will be able to quickly and reliably respond to judicial applications of the Democracy Canon.<sup>45</sup> Here, Professor Elmendorf misunderstands the nature of the court-legislature interaction. As I repeatedly explained in my Article,<sup>46</sup> the Legislature may act *ex ante* in exempting certain election laws from the Democracy Canon when the legislature desires to do so. For example, generally speaking, both the Colorado Supreme Court and the Colorado Legislature have embraced the Democracy

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<sup>41</sup> Hasen, *supra* note 1, at 49 n.79.

<sup>42</sup> Courts wisely have avoided applying the Democracy Canon in cases in which serious allegations of fraud have arisen. In such cases, the danger of lenient interpretation of election laws is that it could facilitate fraudulent activity. In the absence of such concerns, however, there is nothing wrong with privileging voters' rights over other concerns, such as the costs of election administration.

Professor Elmendorf worries that the fraud exception to the Democracy Canon's application could eviscerate the rule, because it is hard to know when fraud exists and allegations of fraud are quite common. Elmendorf, *supra* note 9, at \_\_\_\_ [23 n.80]. Though it may be true that allegations of fraud are quite common after a close election, courts are usually quite adept at dismissing frivolous claims of fraud when made in election contests.

<sup>43</sup> See Hasen, *supra* note 1, at 100-03 (setting forth preference elicitation argument).

<sup>44</sup> See *id.*

<sup>45</sup> Elmendorf, *supra* note 9, at \_\_\_\_ n. 72 [20]. He says that legislatures may do so when there is unified government control and the decision works against the governing party's interests or when the decision disadvantages incumbents of all stripes.

<sup>46</sup> See Hasen, *supra* note 1, at 106, 122.



Canon.<sup>47</sup> But the Colorado legislature wrote a statute dealing with filling vacancies before an election to provide in unmistakable terms that vacancies *shall not be filled* when a vacancy occurs within eighteen days of the general election.<sup>48</sup> By doing so, the Colorado legislature overrode the default Democracy Canon in a particular instance where other interests (such as the interest in efficient administration and prevention of voter confusion in the weeks before the election) trump voters' rights to vote in a truly competitive election.

The Colorado example shows that it does not take legislative omniscience<sup>49</sup> for a legislature in a Democracy Canon jurisdiction to realize it needs to use clear, firm language if it wants courts not to apply the Canon. Of course, many legislatures appear to like application of the Democracy Canon, which is why so many Legislatures have codified it, and perhaps why legislatures such as the New Jersey legislature have not changed their laws in response to aggressive judicial application of the Canon.<sup>50</sup>

*The Democracy Canon and Judicial Partisanship.* Professor Elmendorf notes the “access versus integrity” debate between Democrats and Republicans, in which Democrats favor rules (such as election day registration) that are meant to increase the number of eligible voters and Republicans favor rules that are meant

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<sup>47</sup> See *id.* at 86 n.78 (quoting Colorado Supreme Court decision extending Democracy Canon to absentee ballot legislation); *id.* at 79 n.49 (quoting COLO. REV. STAT. §1-1-103(1) (2008) (“This code shall be liberally construed so that all eligible voters may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections”)).

<sup>48</sup> See *id.* at 108 & n.198 (citing COLO. REV. STAT. ANN. § 1-4-1002(2.5)(A) (WEST 2002)).

<sup>49</sup> Cf. Elmendorf, *supra* note 9, at \_\_\_\_ [11] (“But in point of fact, legislators are not omniscient and they draft statutes under terrific time pressures...”). In addition, as Professor Elmendorf concedes, *id.* at \_\_\_\_ [15], there is no reason to believe that “agenda-displacement costs”—i.e., the costs to the legislature to override judicial errors in statutory interpretation—are greater with the Democracy Canon than any other principle of statutory interpretation.

<sup>50</sup> See Hasen, *supra* note 1, at 110 (“Indeed, despite criticism of the *Samson* opinion, the New Jersey Legislature has not amended its vacancy statute to impose clearer language.”). Professor Elmendorf dismisses the partisan unity in *Samson* on grounds that the case involved replacing a candidate due to a late vacancy, and not an issue of vote counting. Elmendorf, *supra* note 9, at \_\_\_\_ [11]. But *Samson* arose in a highly-charged political atmosphere in which Republicans accused the state Supreme Court of acting in an absurd and unjustified way. Hasen, *supra* note 1, at 108-09.

Professor Elmendorf also suggests that the fact that legislatures do not overrule court application of the Democracy Canon “does not establish that the Canon has any substantive benefits.” Elmendorf, *supra* note 9, at \_\_\_\_ [20]. True, but the fact that many legislatures codify the Canon demonstrates that at least some legislatures see the benefits of the Canon as a default rule, and likely at least some other legislatures do not bother codifying the Canon, even though they like it, because it is an already-established judicial rule.

to deter election fraud (such as voter identification requirements).<sup>51</sup> He then claims that the Democracy Canon takes sides in this debate, by favoring the Democrats:<sup>52</sup> “In an era in which the two major political parties are locked in combat over the extent to which barriers to voter participation or opportunities for voter fraud represent the greater threat to democracy, a tool of statutory interpretation that amounts to a thumb on the scale, of indeterminate magnitude, in favor of voter participation, seems likely to increase both the ‘partisan gap’ in judicial decision-making and the media drumbeat concerning judicial partisanship in election cases.”<sup>53</sup>

Professor Elmendorf’s claim is belied by the evidence of the application of the Democracy Canon in state courts. Consider the controversial *Samson* opinion,<sup>54</sup> described in Part III of my Article. In that case, application of the Democracy Canon favored Democrats, and the unanimous opinion was joined by all the court’s justices, including four Democrats, two Republicans, and an independent.<sup>55</sup> Or consider the pair of 2008 Ohio election law cases that I describe in the introduction of my Article.<sup>56</sup> In both cases, a unanimous Ohio Supreme Court (made up entirely of Republican judges) relied upon the Democracy Canon in ruling on two election challenges: one ruling favored Democrats and the other favored Republicans.<sup>57</sup> If courts are dividing along partisan lines over application of the Democracy Canon, I have not seen it.

The reason that there is not a Democratic valence to the Democracy Canon is no mystery: there is no *a priori* reason to believe that Democrats are more likely than Republicans to want to rely upon the Canon. Republicans are just as likely to face a last-minute vacancy to be filled before an election as Democrats,<sup>58</sup> and a Republican is just as likely to be on the wrong side of a razor-thin election as a Democrat and wish to invoke the Democracy Canon.

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<sup>51</sup> Elmendorf, *supra* note 9, at \_\_\_, \_\_\_ [6, 11]. I have written extensively about this emerging divide in Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007).

<sup>52</sup> Elmendorf, *supra* note 9, at \_\_\_ [5-6] (“The Democracy Canon privileges a couple of these values to the exclusion of others, and it does so in a manner that risks at least the appearance of judicial partiality toward one of the two major political parties (the Democrats).”).

<sup>53</sup> *Id.* at \_\_\_ [10].

<sup>54</sup> N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028 (N.J. 2002).

<sup>55</sup> Hasen, *supra* note 1, at 107. So much for Professor Elmendorf’s statement that “it would be quite surprising if Democratic and Republican judges were able to converge on shared understandings about when the Canon is properly triggered.” Elmendorf, *supra* note 9, at \_\_\_ [9].

<sup>56</sup> Hasen, *supra* note 1, at 70-71 (describing *State ex rel. Colvin v. Brunner*, 896 N.E.2d 979 (Ohio 2008) and *Myles v. Bruner*, 899 N.E.2d 120 (Ohio 2008)).

<sup>57</sup> *See id.* at 79-80.

<sup>58</sup> Consider the recent questionable case in which the Fifth Circuit held that Texas law, read in light of the Constitution’s qualifications clause, barred Republicans from replacing Congressman

In the latter category consider the Coleman-Franken dispute in Minnesota. There, Republican Norm Coleman, slightly behind Democrat Al Franken after a manual recount in the 2008 U.S. Senate race in the state, relied upon the Democracy Canon in arguing that the state must count non-complying absentee ballots.<sup>59</sup> Though it was somewhat entertaining to election law aficionados to hear Coleman's Republican lawyers raising "access" arguments and Franken's Democratic lawyers raising "integrity" arguments, the truth of the matter is that in a close election a candidate's lawyer raises whatever argument may help her client win the election contest, even if it does not line up with the party's official ideology.

In my Article, I recognized that there is a danger that judges could selectively use (or appear to use) the Democracy Canon to reach a particular political outcome.<sup>60</sup> But that is not a risk that applies to only Democratic judges. It exists whenever a canon of construction leaves some play in the joints for statutory interpretation. I hope that my original Article explained why the risk is worth the candle, and how *consistent* court application of the Democracy Canon, coupled with *ex ante* legislative override of the default Canon in appropriate circumstances, can minimize this danger of politicization of the Canon. Indeed, when courts consistently apply the Canon, it can minimize political tension by showing that voters of all stripes get the same benefit of the Canon: sometimes it will help Democratic interests, sometimes Republican interests, and sometimes the interests of others. At its core is protection of voter enfranchisement rights. If in the end that concept lines up more with the rhetoric of Democrats rather than Republicans, it does not seem to affect court application of the Canon.

*The Democracy Canon and Far-Fetched Interpretations of Federal Statutes.* Professor Elmendorf argues against the extension of the Democracy Canon to federal courts because the Canon "could provide a varnish of legality

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Tom DeLay on the ballot in 2006. *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006).

<sup>59</sup> Though Minnesota had a tradition of generally applying the Democracy Canon in election law disputes, it remained in the minority of states refusing to apply the Canon to issues related to absentee ballots. *See* Hasen, *supra* note 1, at 86. In the Coleman-Franken dispute, the state supreme court relied upon this history in rejecting Coleman's argument for use of the Democracy Canon in this dispute, stating that the proper treatment of ballots deviating from statutory absentee ballot requirements "is a policy determination for the legislature, not this court, to make." *In re Contest of Gen. Election Held on Nov. 4, 2008, for the Purpose of Electing a U.S. Senator from Minn.*, 787 N.W.2d 453, 462 n.11 (Minn. 2009). Had the state Supreme Court ruled otherwise for Coleman, by adopting the Democracy Canon for the first time for absentee ballots in the course of resolving a disputed election, it could have raised due process concerns. *See* Hasen, *supra* note 1, at 118-22.

<sup>60</sup> *See id.* at 119.

for far-fetched interpretations of the federal election statutes.”<sup>61</sup> The claim is unsupported. Most applications of the Democracy Canon are entirely routine, such as the Ohio Supreme Court’s recent unanimous ruling that Ohio election officials should accept absentee ballot applications prepared by the McCain campaign even if voters did not check a box affirming citizenship inadvertently placed on the form by the McCain campaign and not required by state law.<sup>62</sup> Far-fetched? What about an order to count hand-marked ballots when the voters did not draw their lines perfectly straight as required by state law,<sup>63</sup> or a requirement to count ballots marked by voters with the names of the candidates’ political parties, despite a statutory prohibition on counting ballots containing any “mark” or other information?<sup>64</sup> These cases are well within the judicial mainstream of statutory interpretation. None of the cases show judges engaging in far-fetched, implausible interpretations.

The only example Professor Elmendorf gives of a potential far-fetched interpretation of federal election law involves suggestions that “left-leaning” judges could read the Help America Vote Act in ways that would contradict the intentions of Congress.<sup>65</sup> Yet he points to no statutory language under HAVA that could allow courts applying the Canon fairly to reach these contorted results. Nor does he point to any state cases applying the Canon in similar circumstances. Indeed, of the three most controversial cases applying the Democracy Canon that I discuss in my Article,<sup>66</sup> Professor Elmendorf says nothing about two of them, and agrees with the result in the third, the New Jersey *Samson* case.<sup>67</sup>

In short, a spate of “far-fetched” interpretations of federal election statutes by (presumably Democratically-appointed) federal judges applying the Democracy Canon seems unlikely to materialize. The same arguments which have sustained the Democracy Canon in state courts for at least 125 years apply in favor of the Canon’s extension to federal courts.

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<sup>61</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [4].

<sup>62</sup> *Myles v. Bruner*, 899 N.E.2d 120 (Ohio 2008).

<sup>63</sup> *Fallon v. Dwyer*, 90 N.E. 942 (N.Y. 1910).

<sup>64</sup> *State ex rel. Law v. Saxon*, 12 So. 218, 224-25 (Fla. 1892).

<sup>65</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [13].

<sup>66</sup> *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1028 (N.J. 2002) (discussed in Hasen, *supra* note 1, at 106-10); *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220 (Fla. 2000) (discussed in Hasen, *supra* note 1, at 114-18); and *Roe v. Mobile County Appointment Bd.*, 676 So.2d 1206 (Ala. 1995) (discussed in Hasen, *supra* note 1, at 118-22).

<sup>67</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [39-40].

## II.

A FEDERAL DEMOCRACY CANON AND ITS LIKELY EFFECT  
ON FUTURE CONGRESSIONAL LEGISLATION

Apart from arguments about the potential negative effects of the Democracy Canon's application on the *courts*, Professor Elmendorf argues that the Canon's extension to federal courts will deter *Congress* from passing future bipartisan election administration legislation. In this Part, I explain why this latter concern is unwarranted.

Professor Elmendorf's argument builds upon the work of Professors Dan Rodriguez and Barry Weingast.<sup>68</sup> Roughly speaking, they argue that the passage of legislation requires legislative leaders to secure the votes of "pivotal legislators" who could vote for or against the bill. To secure these votes, leaders need to make credible statements to the pivotal legislators about ambiguous language or gaps in the proposed legislation. After the legislation passes, courts are called upon to interpret this ambiguous language or to fill in gaps in the legislation. Professors Rodriguez and Weingast advocate that courts "enforce the legislative deal" by interpreting the statute in line with the preferences of the "pivotal legislators." When courts instead adopt an "expansionist" view of ambiguous language, as the authors claim the Supreme Court did in reading portions of the Civil Rights Act of 1964, they make it less likely that pivotal legislators will pass future legislation. In other words, if pivotal legislators know that the courts will not enforce legislative deals, and will instead interpret the statute in a way consistent with the views of its most ardent supporters, they will be less likely to enter into future deals.

Professor Elmendorf's extension of these ideas to the election administration arena is straightforward. Republicans will not sign on to bipartisan legislative deals on election administration without a "belief that courts would enforce the gist of the deal. If Republican Senators and Representative knew that there was a special 'pro voter' canon of interpretation [that] could be trolled out by liberal judges to construe the inevitable imperfections of legislative drafting in a manner that undermines the legislative deal, they would fight tooth and nail against bills that even modestly liberalize the terms of voter participation..."<sup>69</sup>

I am quite dubious of the general Rodriguez/Weingast positive claim that expansionist interpretations of statutes by the judiciary decrease the volume of legislation passed by Congress. To me it is just as plausible that pivotal legislators will simply demand clearer language in order to secure their votes, assuming they

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<sup>68</sup> Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207 (2007).

<sup>69</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [13-14].

even pay attention at all to the scope of judicial interpretations of statutes. I hope to write more about my skepticism elsewhere, but for the sake of argument in this Reply, I will accept the Rodriguez/Weingast general claim.

Even given the correctness of the Rodriguez/Weingast claim, I do not believe application of the Democracy Canon in federal courts to federal election statutes would deter Congress from passing future bipartisan election administration legislation. As explained in Part I of this Reply, Republicans are just as likely as Democrats to benefit from application of the Democracy Canon in election administration court cases. Indeed, just a few months ago, Congress passed the Military and Overseas Voter Empowerment Act,<sup>70</sup> which expands the rights of military and other overseas voters to cast a vote that will be counted in federal elections. Conventional wisdom is that military votes skew Republican, and so application of the Democracy Canon to this statute could help, rather than hinder, Republican self-interest.

Moreover, if Republicans were so averse to voter enfranchisement claims, it is unclear why they would have voted for a “Sense of Congress” resolution in the 2001 amendment to UOCAVA stating that “all eligible American voters, regardless of race, ethnicity, disability, the language they speak, or the resources of the community in which they live, should have an equal opportunity to cast a vote and to have that vote counted.”<sup>71</sup> A Republican majority worried about “liberal judges” deciding election administration cases with a “pro-voter” bias certainly would not have given such judges a hook to upon which to hang such a pro-voter interpretation.

Finally, since 2000 it has proven to be difficult as a general matter to pass bipartisan election administration legislation.<sup>72</sup> Professor Elmendorf has not shown that a canon of statutory interpretation that might apply to certain disputes

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<sup>70</sup> P.L. 111-84, §§ 575-89, *available at* <http://www.scribd.com/doc/21814319/Military-and-Overseas-Voter-Empowerment-Act>.

<sup>71</sup> Pub. L. No. 107-107, div. A, titl. XVI, § 1601, 115 Stat. 1274 (2001). The language was approved as part of a broader defense appropriations bill. When that appropriations bill was considered in the Senate, Republican Senator Allard initially proposed an amendment expressing a sense of the Senate about the importance of protecting the voting rights of uniformed voters. See S.Amend.1755 to S.1438, <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SP01755>:. The amendment did not include the language quoted in the text above. Instead, the quoted language was added by a bipartisan House-Senate conference, H. Rpt. 107-333, § 1601, <http://thomas.loc.gov/cgi-bin/cpquery/R?cp107:FLD010:@1%28hr333%29>:. Republicans in the House voted for the final bill including the quoted language by a vote of 174 in favor to 34 opposed. All Republican Senators but one (Senator McCain) voted for the final bill, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=107&session=1&vote=00369](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00369). One Republican Senator did not vote.

<sup>72</sup> See Hasen, *supra* note 51.

involving some aspects of election legislation is likely to have anything more than a negligible effect on the chances of future election legislation passing.

### III. JUDICIAL DECISION RULES IN ELECTION CASES AND THE BENEFITS OF SIMPLICITY

In addition to Professor Elmendorf's many arguments against the Democracy Canon, he uses more than half of his response to offer three alternative canons of interpretation in statutory election law cases which he claims are "more normatively defensible and less politically treacherous" than the Democracy Canon.<sup>73</sup> He spends a full-third of his Response, [16] pages, on one of the three canons, the Effective Accountability Canon ("the EA Canon").<sup>74</sup> My purpose in this Part is to show that the EA Canon is less normatively defensible and more politically treacherous than the Democracy Canon.

Consider some of the great benefits of the Democracy Canon already explored. It is simple and easily understood: courts should interpret unclear statutes to favor the voters. Judges and lay people can understand a rule that says that someone who cannot draw a straight line in filling in a ballot should still have her vote counted despite a law providing for ballots to be marked with two straight lines. The Canon has been applied consistently by many state courts by judges of all ideological persuasions for 125 years. The Canon reinforces a popular underenforced constitutional norm to favor the enfranchisement of voters and their chance to vote in competitive elections. The Canon, once established, can provide a baseline for judges of various ideologies to apply to election statutes. Legislatures that do not want voter-enfranchising interpretations of statutes in particular cases can draft around the default rule. The Canon is unlikely to lead to far-fetched interpretation of election statutes.

Now consider the EA Canon. It is hard for me to briefly describe the EA Canon; indeed, I had to read Professor Elmendorf's description numerous times before I could understand it.<sup>75</sup> It appears that Professor Elmendorf advocates use

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<sup>73</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [4].

<sup>74</sup> His "Carrington canon" would call upon courts to construe statutes narrowly that were passed on a party line vote. *Id.* at \_\_\_\_ [6-7]. I have expressed my skepticism of statutory interpretation based upon improper partisan motive in Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843. His "Neutrality canon," which he spends the least time explaining, would have courts "interpret election codes with an eye to reducing the fact or appearance of judicial partisanship." Elmendorf, *supra* note 9, at \_\_\_\_ [7].

<sup>75</sup> Here is Professor Elmendorf's introductory paragraph explaining the concept:

of the EA Canon to interpret ambiguous statutes to (1) insure that the voting public is representative of the group of people entitled to vote; (2) improve the aggregate competence of the voting public to make decisions about which candidates retrospectively and prospectively act in the voters' interest; and (3) facilitate coordination among like-minded voters.

The vices of such a canon of interpretation are many. First, the canon is complex and abstract. How are courts to know what improves "aggregate competence of the voting public"? How is a court to implement a "presumptive preference for the regime under which the demographics of the persons who vote better mirror those of the entire normative electorate?"<sup>76</sup> Apparently, in making these judicial determinations, courts "would have to wade through and adjudicate disputes among political scientists about the actual or likely effects of alternative institutional arrangements."<sup>77</sup> Professor Elmendorf assures us that if courts get these wrong, it is no matter, as "judicial mistakes would be subject to correction by the legislature or an implementing agency."<sup>78</sup> He does not explain why the "agenda displacement" and other costs he associated with legislative override of the Democracy Canon would not apply at least as strongly with respect to judicial determinations under the EA Canon.

Make no mistake: the EA Canon would be difficult to apply, and the outcome of challenges brought in reliance on the EA Canon difficult to predict. Not every court applying the statute will be stacked with former law professors

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The very idea of democracy presupposes a normative electorate to which public officials are ultimately accountable. Although the normative electorate must be defined in a manner that gives it a fair claim to speaking for the citizenry as a whole, reasonable people may disagree about the propriety of one or another voter qualification (consider the status of felons). There is also ample room for debate about what offices should be elective, the frequency of elections, the separation or consolidation of governmental powers, the scope for directly democratic lawmaking, the constitutional entrenchment of preferred rights, and more. Bracketing these large normative questions, however, we can say that *the electoral component* of a political order is more or less effective vis-à-vis the objective of polar accountability depending on (1) the degree to which the persons who turn out to vote are representative of the normative electorate as a whole; (2) the aggregate competence of the voting public in apportion blame retrospectively, and, arguably, in identifying those candidate who are most likely to act as the voters—if fully informed—would wish for them to act; and (3) the extent to which the electoral system facilitates or retards effective coordination among like-minded voters.

Elmendorf, *supra* note 9, at \_\_\_\_ [24] (footnotes omitted and original emphasis).

<sup>76</sup> *Id.* Or consider this constitutional principle Elmendorf advocates: "An election law...is unconstitutional if there are practicable alternatives that would result in substantially more effective accountability to the normative electorate as a reasonable cost." *Id.* at \_\_\_\_ [25].

<sup>77</sup> *Id.* at \_\_\_\_ [39].

<sup>78</sup> *Id.*



trained in abstract legal theory, and there is no guarantee that theoreticians would do an especially good job interpreting election statutes. This is especially true because the rule is inchoate, to be filled with the ideological preferences of the judges applying it. The EA Canon emerges not from court experience interpreting statutes, but from Professor Elmendorf's head, and his (admittedly controversial) reading of the Guarantee Clause of the Constitution.<sup>79</sup> Indeed, Professor Elmendorf concedes that the EA Canon has not been adopted by any court, and it has been rejected repeatedly by the Supreme Court in its constitutional variant.<sup>80</sup>

Despite the fact that the EA Canon has no tradition or pedigree, and it not easily understood, its application apparently could be very far-reaching, much further reaching than the Democracy Canon. Professor Elmendorf claims that in its constitutional manifestation the Effective Accountability norm could "be used to attack the timing of elections; the drawing of electoral districts, the existence of nonpartisan elections; the choice between districted and at-large elections; the provisions (or lack therefore) of information to voters on the ballot, in ballot pamphlets, or in pre-election mailings; ballot design; state policies that bear on the privacy or publicity of voting behavior; the variety and extent of campaign finance restrictions; the location of voting precincts and the provision (or lack thereof) for county-level 'vote centers'; the permissibility of national parties fielding candidates for local office; and perhaps even the issue of 'full electorate' elections..."<sup>81</sup> Its statutory analogue, the EA Canon, could be used to further these same goals through interpretation of ambiguous election statutes. Though Professor Elmendorf seems to believe that courts applying EA norms in statutory cases will be more restrained than if those who would apply these norms in constitutional cases, I do not share his confidence.

Despite this breathtaking breadth of the EA Canon, which would be a great expansion of judicial power in the pursuit of structural interests (and not voting rights),<sup>82</sup> there is no reason to believe that courts applying the EA Canon would be seen by the public as reaching more legitimate decisions than courts applying the Democracy Canon. Professor Elmendorf tells us that the

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<sup>79</sup> Elmendorf, *supra* note 9, at \_\_\_[28] (admitting the lack of clarity about the meaning and enforceability of the Guarantee Clause, but arguing that his analysis "does yield a picture of the Clause's meaning that *in some respects* is clear enough for judicial enforcement through tools of statutory construction.") (original emphasis).

<sup>80</sup> *Id.* at \_\_\_ [34-35].

<sup>81</sup> *Id.* at \_\_\_ [36-38] (footnotes omitted).

<sup>82</sup> *See, e.g., id.* at \_\_\_ [40] ("From an accountability perspective, who wins a razor-thin election is unimportant; the leading vote-getters have proven themselves more or less equally satisfactory to the voters."). For my take on the rights-structure debate, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* ch. 5 (2003).

controversial *Samson* case would come out the same way under the EA Canon<sup>83</sup> as it did under the Democracy Canon, but he also tells us that the public pays attention to judicial results, not reasoning.<sup>84</sup> If application of the Democracy Canon in *Samson* could undermine public confidence in the judiciary, why would the EA Canon not do the same?

Finally, Professor Elmendorf cavalierly predicts (without providing any evidence) that there would be less judicial partisanship under the EA Canon, as there are aspects of it that should appeal to Democratic judges and aspects that appeal to Republican judges.<sup>85</sup> This statement appears to be based upon little more than wishful thinking; in contrast, we have a long tradition of bipartisan judicial application of the Democracy Canon.

In sum, the EA Canon has fewer normative benefits than the Democracy Canon and many potential drawbacks. It maximizes judicial power in the name of promoting certain structural values, without regard to safeguarding individual voting rights. The EA Canon's complexity and uncertainty in application increases the chances the canon could be manipulated for partisan reasons or misapplied. It is not the kind of judicial rule that would promote confidence in the judiciary.

## CONCLUSION

Professor Elmendorf finds much to criticize in the Democracy Canon, and argues against its extension to federal courts, despite the Canon's long pedigree and consistent application by judges of various parties and ideologies in state courts. As I have shown here, Professor Elmendorf unduly downplays the Canon's benefits and exaggerates the risks attendant with the Canon's application. My appreciation for the Democracy Canon has only increased when I compare the Canon to Professor Elmendorf's alternative EA Canon. Empowering courts with something like an EA Canon would be dangerous for the judiciary, by injecting courts further into the political thicket without clear guidance or purpose. In this instance, simplicity and tradition in election adjudication trump novelty and complexity.

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<sup>83</sup> Elmendorf, *supra* note 9, at \_\_\_\_ [39-40].

<sup>84</sup> *Id.* at \_\_\_\_ [10].

<sup>85</sup> *Id.* at \_\_\_\_ [40] (finding "some basis for hoping that an equilibrium would emerge in which liberal and conservative judges honor one another's concerns in cases that implicate the canon").